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# In the Supreme Court of the United States.

OCTOBER TERM, 1976.

No. 76-1006.

LOUIS OSTRER,
PETITIONER,

*v.*

UNITED STATES OF AMERICA,
RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

## Petitioner's Reply Brief.

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BATEMAN & SLADE, INC. BOSTON, MASSACHUSETTS.

## Table of Contents.


| | |
|---|---|
| Argument | 1 |
| Conclusion | 11 |


## Table of Authorities Cited.

### Cases.


| | |
|---|---|
| Weatherford v. Bursey, ____ U.S. ____ (February 22, 1977) | 1, 2, 3, 4, 9, 10 |


### Constitutional Provisions.


| | |
|---|---|
| United States Constitution, Sixth Amendment | 2, 6, 9 |

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### Argument.

In *Weatherford* v. *Bursey*, ____ U.S. ____ (February 22, 1977), the respondent asked this Court to affirm the holding of the Fourth Circuit that "whenever the prosecution knowingly arranges and permits intrusion into the attorney-client relationship, the right to counsel is sufficiently endangered to require reversal and a new trial" (Slip opinion at p. 3, quoting 528 F. 2d 483 (1975)). The Solicitor General

opposed an absolute rule of reversal in the absence of actual communication of the overheard material to the prosecution. He conceded, however, that Sixth Amendment concerns "are activated" whenever there is "actual acquisition by the prosecution of confidential defense strategy information" (Solicitor General's brief in *Weatherford* at p. 32). This Court, in rejecting respondent's argument and accepting the Solicitor General's, repeatedly drew the distinction between cases where there was no communication of defense strategy to the prosecutor (such as in *Weatherford*) and cases where there was such communication (Slip opinion at pp. 3, 4, 8, 10). The Court limited its decision to cases where "nothing at all" was communicated to the prosecution. It explicitly left open the question whether a new trial would be required in cases where the thrust of the unlawfully overheard defense strategy conversations had been communicated to the prosecution. Indeed, it strongly implied that reversal *would* be required in cases of actual communication: "had the prosecution *learned* from Weatherford, an undercover agent, the details of the Bursey-Wise conversations about trial preparations, *Bursey would have a much stronger case*" (Slip opinion at p. 8; emphasis added).

This is precisely that "much stronger case." In *Weatherford*, this Court said that the argument for a new trial "founders on the District Court's express finding that Weatherford *communicated nothing at all* to his superiors or to the prosecution about Bursey's trial plans or about the upcoming trial." Here, the District Court made precisely the *opposite* finding from that made in *Weatherford* (Slip opinion at p. 10). The District Court here found (and the Court of Appeals adopted this finding) that Assistant District Attorney "Fine did transmit information to [trial prosecutor] McGuire that he derived from the eavesdropping on



Ostrer's conversations" (App. 25a). Moreover, the Government conceded in the court below that "the thrust of the conversation" between petitioner and his attorney concerning the legal strategy to be employed in dealing with a potential government witness *was transmitted* to the trial prosecutor (Government's brief on appeal at p. 45).

In a less-than-candid effort to persuade this Court that *Weatherford* forecloses reversal of petitioner's conviction, the Solicitor General's brief deliberately misrepresents petitioner's contention and seriously misstates the District Court's findings.

The Solicitor General's brief describes the "petitioner's contention" as follows: "that there must be a new trial whenever any conversation between a defendant and an attorney is overheard" (Brief for United States in Opposition at p. 6). *Petitioner challenges the Solicitor General to quote or cite a single reference to any such contention in the entire record of this case!* It has never been petitioner's contention that a new trial is required "whenever any conversation between a defendant and an attorney is overheard." It is petitioner's contention — and it has consistently been throughout this case — that reversal is required only when the unlawfully overheard conversation "has been directly and deliberately *communicated* to the Assistant United States Attorney who prosecuted the petitioner" (Petition at p. 4 (emphasis added); *see also* Petition at pp. 6, 8, 14, 16, 17, 19, 20, 25, 31).[1]

[1]It is inconceivable that the Government's misrepresentation of petitioner's contention could have been anything but deliberate. It is — and has been — the essence of petitioner's argument to distinguish those cases where there has been no *communication* (such as *Weatherford*) from those cases (such as his own) where there *was actual communication*. Indeed, the very first sentence of his argument in the Petition emphasized that distinction by italicizing the crucial words: "An exhaus-

This is the first and only case, to petitioner's knowledge, in which a conviction has been affirmed in the face of an express finding of fact — and Government concession — that the thrust of an unlawfully overheard conversation between a criminal defendant and one of his lawyers dealing with defense strategy was *communicated* to the actual trial prosecutor. That important and recurring issue was expressly left open by this Court in *Weatherford*; the Government cannot make petitioner's contention appear "foreclosed by *Weatherford* v. *Bursey*" by simply misrepresenting — as it has done — petitioner's actual contention.

The Solicitor General's brief also seriously misstates the trial court's findings, in an apparent effort to persuade this Court that here "as in *Weatherford*, the important Sixth Amendment concerns have not been activated, and there is no need to inquire further" (Brief in Opposition at p. 7).

The Government asserts, without record citation, that the only information overheard was "a plan to obstruct justice at petitioner's federal trial," and that there was no overhearing of any other conversations "even arguably involv[ing] attorney-client confidences" or "legitimate trial strategy" (Brief in Opposition at pp. 2, 8).

Although the Government has consistently *argued* that the conversation between petitioner and attorney Julius November was not a privileged communication between a defendant and his lawyer, the District Court expressly rejected this argument and found — after an extensive evi-

tive search of the cases reveals that the Second Circuit is the only Circuit to have *ever* affirmed a conviction in the face of a record on which the Government concedes that there was *actual communication to the trial prosecutor* of the thrust of unlawfully intercepted legal strategy sessions between a criminal defendant and his lawyer" (Petition at p. 16; emphasis in original). This emphasis on the actual communication of overheard material is repeated on virtually every page of the Petition.



dentiary hearing — that the conversation at issue was an "attorney-client communication" covered by the privilege. See Appendix at p. 6a.[2] The trial court expressly refused to find — though the Government pressed it to do so — that the overheard and transmitted November-Ostrer conversation was "a plan to obstruct justice at petitioner's federal trial." Accordingly, the Government's "Question Presented," as well as most of its legal argument, is premised on an assumption expressly rejected by the District Court. This case must be decided on the premise — which is true as a matter of fact as well as law — that the unlawfully overheard and communicated November-Ostrer conversation involved legal counsel and strategy between the defendant and his retained lawyer[3] concerning the upcoming federal trial.

Moreover, the record clearly establishes — and the trial court plainly found — that the state officials did overhear a great deal of defense strategy in addition to the November-Ostrer conversation. The trial court found that the District Attorney's office overheard repeated discussions concerning the following matters related to the "impending federal trial":

> "Among the more significant topics discussed were, (1) whether Ostrer should seek a trial severance from his co-defendant John Dioguardi; (2) whether Ostrer should waive his right to a jury trial and testify in his

[2] We therefore conclude that "for purposes of this motion, November was acting as an attorney for Ostrer," and that "Ostrer reasonably believed that November was extending legal counsel. . . ." *Ibid.*

[3] The Government's assertion that November "was not retained by petitioner to represent him in the federal trial" (Brief in Opposition at p. 7) is simply not true. November was not retained to *appear* for him at the federal trial, but he was most assuredly retained to *advise* him about the federal trial, and he participated extensively in pre-trial preparations, as the wiretap tapes themselves establish.

own behalf; (3) the likely impact of Ostrer's testimony, considered in light of disclosure on cross-examination of his prior state felony conviction as impeachment; and (4) the tactical value of having Ostrer introduce certain cancelled checks. Also mentioned was the name of Ostrer's private investigator, one James Lynch, formerly of the Federal Bureau of Investigation." (App. 4a.)

There can be no doubt that these overheard conversations involved "legitimate trial strategy." The fact that these discussions were not with Maurice Edelbaum — the lawyer who *appeared* for petitioner at his criminal trial — is irrelevant to petitioner's claim, especially since the trial judge expressly found that these overheard conversations "included discussions by others with Ostrer of Mr. Edelbaum's comments and advice" (App. 4a). The Sixth Amendment and the right to a fair trial rule surely protect the defendant from unlawful overhearing of defense strategy and legal advice, even if the voice of the chief trial lawyer, as distinguished from that of an attorney on the defense team, is not overheard.

The Government's brief flatly misrepresents the trial court's findings when the brief asserts that other than the December 22, 1972, meeting between the Assistant District Attorney and the trial prosecutor, "[t]here were no further contacts between the state and federal prosecutors until after petitioner's trial" (Brief in Opposition at p. 4). The District Court found that Assistant District Attorney "Fine's diary entry for December 29, 1972 (Ex. B) shows that on that date Fine telephoned McGuire to inquire whether Moss was under subpoena for the Belmont trial. Fine recommended that the subpoena remain in effect. McGuire was willing to keep Moss under subpoena to accommodate Fine, and because he could not be certain that some circumstance might not develop at trial making Moss's testimony significant" (App. 20a). Thus, there was at least one "further contact" of considerable significance between the state and federal prosecutors prior to the termination of petitioner's trial.



The Government tries to dismiss any possible role that the transmitted November-Ostrer conversation might have played in McGuire's trial strategy by claiming that, by the time he received the transmission, "the federal prosecutor already had decided not to call Moss as a witness" (Brief in Opposition at p. 6). However, in view of the federal prosecutor's affidavit submitted to the District Court making no more of a claim than that he had "just about decided" not to use Moss as a witness, and in view of the prosecutor's testimony at the evidentiary hearing, the District Court did not make any such categorical finding. Rather, the court's findings recognized that McGuire, while leaning away from calling Moss as a witness, nevertheless kept him under subpoena in part "because he could not be certain that some circumstance might not develop at trial making Moss' testimony significant" (App. 20a). Thus, it cannot be disputed that at the time Assistant United States Attorney McGuire made his final decision not to use Moss as a witness, he (McGuire) had in mind Assistant District Attorney Fine's warnings about Moss' vulnerability as a witness. One would indeed need a crystal ball to weigh and determine precisely how this knowledge might have influenced McGuire's ultimate decision as to Moss.

Furthermore, the Government again misstates critical facts found by the District Court when its brief attempts to convey the impression (1) that the Ostrer-November overheard and transmitted discussion was part and parcel of a plot to discourage Moss from testifying (Brief in Opposition at p. 4), (2) that the entire November plan was to threaten or seek to introduce at the trial evidence of Moss' adultery

(*id.* at p. 6, n. 5), (3) that only information about Moss' adultery was transmitted to the trail prosecutor (*id.* at p. 7), and (4) that in any event it did not matter that the trial prosecutor knew that Ostrer and November knew of Moss' adultery, since evidence of this adultery would not have been admissible at the trial to impeach Moss (*id.* at p. 6, n. 5). In all of these four matters, the facts are quite contrary to the Government's contentions.

First of all, the Ostrer-November plan was not to discourage Moss from testifying, but was, rather, calculated to extract from him at the trial certain information possessed by Moss that Ostrer and his counsel believed to be exculpatory. The heart of the District Court's opinion seeks to analyze Moss' potential testimony on cross-examination and to determine if in fact it would have been exculpatory to Ostrer. (The court found that it "would not necessarily have been exculpatory of Ostrer," App. 31a, although the court could not, of course, say with any reasonable certainty that Moss' testimony clearly would not have helped Ostrer.)

Secondly, evidence of Moss' adultery was only a tiny and relatively unimportant piece of the total information that November felt could be extracted from Moss on cross-examination. More important than the adultery testimony would have been Moss' testimony that he and Ostrer were equal partners in any profit earned by Moss' investment, thereby contradicting the chief Government witness Hellerman's testimony that he (Hellerman) was partners with Ostrer. (See the District Court's discussion and analysis of Moss' possible testimony at Appendix pp. 31a-32a.) November's plan was far more sophisticated than the Solicitor General's brief would lead one to believe.

Third, the adultery information transmitted to the trial prosecutor was not the "only" information revealed. In



fact, specific information about Moss' adultery was not transmitted at all. Rather, what was transmitted by Fine, as found by the District Court, was the more general conclusion that "Ostrer had certain information regarding Moss" and that "this information would be used to effect an obstruction of justice." This was, of course, Fine's way of warning McGuire not to use Moss as a witness, and McGuire got the message, for he told Fine, as found by the District Court, that Fine need not worry, since McGuire would not call Moss as a witness (App. 18a).

Fourth, the Government can get no solace from the claimed inadmissibility at trial of the evidence of Moss' adultery. The intercepted Ostrer-November conversation made it perfectly clear that a major reason for keeping available as a witness the woman with whom Moss was having an affair was not so that she could testify as to the affair, but rather so that she could testify that on numerous occasions Moss had made to her statements about Ostrer that either contradicted what Moss had told the Government about Ostrer or revealed Moss' motives for wanting to bury Ostrer. Thus, this witness could impeach Moss insofar as Moss might have testified on direct examination against Ostrer, while Moss himself as a witness would have supplied significant exculpatory evidence on cross-examination. All of this the Government skips over in its brief.

Furthermore, the Solicitor General can hardly now rely (Brief in Opposition at p. 6) upon the purported "good faith" of the Government, since in its brief in *Weatherford* the Government recognized that the dangers to the Sixth Amendment are just as great if the defense strategy was overheard in good faith or in bad faith. (See Solicitor General's brief in *Weatherford* at pp. 30-31, quoted in Ostrer's Petition at p. 19.)

One of the most serious errors in the Government's Brief in Opposition is the claim that there is no need to resolve any doubts against the Government here (notwithstanding its concession in its *Weatherford* brief that such doubts should be resolved against the Government) because "the extent of the transmission of information has been reliably determined" (Brief in Opposition at p. 8). One of the most serious problems facing the petitioner at the evidentiary hearing was the mysterious, unexplained loss of the critical document that could have established authoritatively what further information was in fact transmitted to the trial prosecutor — the detailed notes of the Assistant District Attorney. (The trial prosecutor, who kept detailed notes of other events, claimed not to have made any notes of the critical meeting with Mr. Fine.) (See discussion in the Petition at pp. 27-30.) Surely the most serious doubts are raised, especially in a subtle case such as this where the extent of communications, and the impact of those communications on the prosecutor's thinking process, are being explored by a defendant who does not even have access to contemporary notes taken at the critical transmission of information.

The Solicitor General also seeks false comfort by claiming that the police officers who intercepted the attorney-client conversations did not know and had no way of knowing that November was an attorney. This claim, even if true, overlooks the fact that Assistant District Attorney Fine, who supervised the policemen and who listened to the tape recordings and read the wiretap logs, admittedly knew (as the District Court found) that November was indeed an attorney (App. 13a).



**Conclusion.**

The District Court's findings of fact make this precisely the "much stronger case" than *Weatherford* and the case left undecided by that decision. The issue of whether a new trial is required when unlawfully overheard legal strategy discussions have been communicated to the trial prosecutor is an important and recurring one over which the Circuits are irreconcilably split. The effective administration of justice requires this Court to grant the instant petition in order to resolve this important conflict. At the very least, this case should be remanded to the lower courts for reconsideration in light of *Weatherford* v. *Bursey*.

Respectfully submitted,

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